

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES

v.

MANNING, Bradley E., PFC

U.S. Army, (b) (6)

Headquarters and Headquarters Company, U.S.

Army Garrison, Joint Base Myer-Henderson Hall,

Fort Myer, VA 22211

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**DEFENSE REQUEST FOR
PARTIAL RECONSIDERATION
OF DISCOVERY RULING**

DATED: 12 April 2012

RELIEF SOUGHT

1. The Defense respectfully requests that the Court reconsider, in part, its ruling on the Defense Motion to Compel Discovery.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2), 905(f). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1), 905(f).

ARGUMENT

3. In the Prosecution Response to Defense Motion to Compel Discovery (“Government Motion”), the Government stated the following:

The United States is in the process of producing all discovered information “relevant and necessary” to Defense’s request that the United States has authority to disclose under federal rules. The United States disputes whether Defense provided a specific request, and adequate basis, for its request for “any grand jury testimony.” However, in an abundance of caution, the United States intends to produce all grand jury materials, both classified and unclassified, that are “relevant and necessary” and that the United States has authority to disclose under the federal rules.

See Government Motion, p. 14. Presumably based on the Government’s representation, the Court did not specifically address the grand jury testimony in its Ruling.

4. The Defense requested clarification from the Government on what exactly it intended to provide in regard to the grand jury materials. During an 802 telephonic conference, the Government seemed to suggest that it would produce all relevant material from the grand jury testimony. The Government explained that since there were some wholly irrelevant aspects to the grand jury testimony, those portions of the grand jury testimony would not be provided. The Government implied, however, that everything else would be provided. The Government indicated that it would provide such grand jury testimony in accordance with the timeframe established by the court (i.e. April 20).
5. Unfortunately, the Defense is still not clear on what exactly the Government was planning on turning over. On 9 April 2012, the Defense sent an email seeking further clarification. The email traffic reads as follows:

David Coombs: In your response to the Defense Motion to Compel Discovery, dated 8 March 2012, you stated “[t]he United States intends to produce all grand jury materials, both classified and unclassified, that are ‘relevant and necessary’ and the United States has authority to disclose under the federal rules.” During our last 802 conference you stated that you intended to provide the grand jury materials. Can you provide me with an estimated time line for these materials? Thank you.

Ashden Fein: We are working to review this material along with the FBI case file. If we find discoverable material, we will provide it to the defense as soon as possible once we confirm that we have the authority to disclose. We estimate that we will complete our review of any grand jury testimony in the next three weeks and intend to notify you of any discoverable material by 1 May. Additionally, we hope to disclose any discoverable material by 1 May as well.

David Coombs: I am not for sure I understand your response. What is the “discoverable material” standard that you are using to determine what to disclose? Also, why do you believe it would take until May 1st to complete your review? The Grand Jury investigation started in December of 2010. At that time, the Defense requested access to the investigation being conducted by the DOJ. Additionally, you have been on notice that these materials were the subject of a compel discovery motion since February. I am not clear on why the review hasn’t already been done, and why I don’t have these documents.

Ashden Fein: Material outside the possession of military authorities is discoverable under RCM 701(a)(6) and Brady. The United States has provided the defense FBI and grand jury material above and beyond this requirement and continues to review and coordinate additional review of material, including testimony. This case was referred in early February, and we have since been litigating this issue, which resulted in the United States informing the Court and defense that we intend to produce, as soon as practicable, any discoverable material we identify and have approval to make available. No later than 1 May is our best estimate considering the amount of information that the prosecution has a due diligence requirement to review and which we have been and are continuing to review.

David Coombs: Can you provide me with the Bates numbers for any grand jury testimony that have you provided to the Defense? Thank you.

Ashden Fein: We have not provided any grand jury testimony, only materials obtained through the grand jury.

6. In the Defense's opinion, it is still not clear what the Government will provide in relation to the grand jury materials. However, it seems based on the latest representations of the Government that not all relevant materials will be turned over. It only intends to disclose to the Defense *Brady* material under R.C.M. 701(a)(6).

7. Consequently, the Defense requests that the Court order the entire grand jury proceedings in relation to PFC Manning or Wikileaks to be produced to the Defense. Alternatively, the Defense requests that the grand jury proceedings be produced for *in camera* review to determine whether the evidence is discoverable under R.C.M. 701(a)(2) as being material to the preparation of the defense.

Respectfully submitted,

DAVID EDWARD COOMBS
Civilian Defense Counsel